# STATE OF MICHIGAN

# COURT OF APPEALS

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BENJAMIN YOUNG,

Plaintiff-Appellant,

v

BORMAN'S, INC., d/b/a FARMER JACK SUPERMARKET, and PARKWOOD PLAZA LIMITED PARTNERSHIP,

Defendants-Appellees.

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UNPUBLISHED
March 11, 2003

No. 236443
Oakland Circuit Court
LC No. 00-021536-NO

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this negligence and premises liability action. We affirm.

This case arises from plaintiff's alleged fall in the parking lot of a Farmer Jack Supermarket in Oak Park. According to plaintiff, in the early evening of February 1, 1999, after sundown, he brought his mother to defendant supermarket. Because he was unable to find a parking space convenient to the entrance, he dropped off his mother by the door and then parked in the north parking lot. While returning to his car after shopping, he walked on a path through the shoveled snow piled around the lot. As he continued to walk between two parked vehicles in a poorly lit area, he tripped over a broken, battered shopping cart and debris left as a result of the apparent collision of the shopping cart and one or more vehicles, with other debris entangled in it. Consequently, plaintiff sustained injuries, including a broken leg. After the fall, plaintiff got up, put the pop he was carrying in the trunk of his car, and then proceeded to pick up his mother at the front of the store.

In a complaint dated March 10, 2000, plaintiff alleged that defendant Borman's, Inc.'s negligence resulted in his injuries. Months later, the parties stipulated and agreed to add to the action defendant Parkwood Plaza Limited Partnership, the owner of the property, including the parking lot, in which defendant Borman's operated its store. On November 2, 2000, the trial court entered an order indicating that Parkwood Plaza be added as a party defendant. The following day, plaintiff filed an amended complaint. Thereafter, on January 3, 2001, Borman's moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The parties waived oral argument. The trial court granted summary disposition in favor of Borman's pursuant to MCR

2.116(C)(10). The trial court denied plaintiff's motion for reconsideration. Months later, the trial court dismissed defendant Parkwood Plaza for the same reasons set forth by the court in its grant of summary disposition to Borman's, Inc. This appeal ensued.

On appeal, plaintiff presents four separate issues. However, in essence, plaintiff argues that the trial court erred in granting summary disposition in favor of defendants on the basis of the open and obvious danger doctrine. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

In general, a possessor of land owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-612; 537 NW2d 185 (1995). The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the possessor of land has a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. The critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly special aspects of the open and obvious condition that create an unreasonable risk of harm. *Id.* If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Id.* at 517-519.

In the present case, defendant testified in his deposition that he goes to defendant supermarket on average twice per week and that he had no problem seeing where he was going while walking from his car into the store, although it was getting dark at that point. Plaintiff testified that after shopping, while carrying in his hand a plastic bag with some bottles of pop in it, he began his return to his car along the same path he took toward the store and at that time he had no problem seeing. However, as he attempted to pass through the middle of an open parking

spot to get to the rear of his car, he tripped and fell. Plaintiff further testified that he was looking ahead while walking, not looking down, and did not look down to see if there was anything in the parking space. Plaintiff also testified that he did not have a hard time seeing.

The fact that plaintiff claimed that he did not see the shopping cart debris is irrelevant. *Novotney*, *supra* at 475. Although plaintiff argues that the lighting in the parking lot was inadequate, his deposition testimony indicates otherwise. It is reasonable to conclude that plaintiff would not have been injured had he been watching the area in which he was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff did not come forward with sufficient evidence to create an issue of fact as to whether an average person with ordinary intelligence could not have discovered the condition upon casual inspection. *Novotney, supra* at 474-475. The trial court did not err in concluding that the condition of the parking lot constituted an open and obvious danger.[1]

Furthermore, plaintiff's argument that the condition of the parking lot was unreasonably dangerous under the circumstances is without merit. Although the alleged fall is unfortunate, had plaintiff watched where he was walking, the fall could have been avoided. Even accepting as true plaintiff's assertion that the parking lot was dimly lit, in light of plaintiff's deposition testimony that before his fall he did not have a hard time seeing that evening, an average person, upon casual inspection, could have discovered the shopping cart debris in the open parking space. Plaintiff has presented no evidence that the situation was unavoidable or that special aspects of the condition imposed an unreasonably high risk of severe harm. *Lugo, supra* at 518-519. Plaintiff has presented "no evidence upon which a rational factfinder could conclude that, notwithstanding its open and obvious nature, the [shopping cart debris] still presented an unreasonable risk of harm." *Millikin, supra* at 499. Thus, the trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski
/s/ Karen Fort Hood

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[1] To the extent that plaintiff argues that defendants owed him additional duties, we note that the open and obvious doctrine "protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, *regardless of the alleged theories of liability*." *Millikin, supra* at 497; see also *Joyce v Rubin*, 249 Mich App 231, 235-237; 642 NW2d 360 (2002).